No. 3840

United States
Circuit Court of Appeals
For the Ninth Circuit.

May Term A. D. 1922

MURRAY L. McGREW and FRANK L. BOYD,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Plaintiffs in Error

Upon Writ of Error to the United States District Court of the District of Montana.

Honorable GEORGE M. BOURQUIN,
Judge.

J. A. KAVANEY,
Attorney for Plantiffs in Error.

JOHN L. SLATTERY, Esq.,
U. S. Attorney,

RONALD HIGGINS, Esq.,
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Assistant U. S. Attorney,
Attorneys for Defendant in Error.

STATE PUBLISHING CO., HELENA, MONT.

INDEX TO PRINTED BRIEF

INDEX TO CASES CITED

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PRELIMINARY STATEMENT

The above entitled action was brought by the United States of America, defendant in error, to the United States District Court for the District of Montana, Great Falls division, upon an information charging and accusing plaintffs in error, with three separate ad distinct counts:

First: "Illegally transporting intoxicating liquors without a permit."

Second : "Illegally transporting ntoxicating liquors without making a permanent record thereof."

Third: "Wrongfully possessing intoxicating liquors for use in violation of the National Prohibition Act."

On December 20th, 1921, said cause was tried to a jury which resulted in a verdict of "Guilty" and a joint fine of Three Hundred ($300) Dollars and cost, was therefore imposed upon said defendants, plaintiffs in error here; wherefore application was made to the United States District Court for the District of Montana, for a Writ of Error to review the judgment and record of the case, which writ was by the Honorable George M. Bourquin, Judge of said Court, granted and allowed on the 20th day of February, A. D. 1922, bringing the case to this court for review.

STATEMENT OF FACT

On the night of November 10th, 1921, at the hour of about two o'clock in the morning, while plaintiffs in error were travelling along the public highway near the station of Vergille, in the County of Chouteau, State of Montana, driving an automobile, they were suddenly confronted by the sheriff of Chouteau County, together with one of his deputies, who after covering them with guns, forced them to stop, leave their car, searched their persons and the contents of their car; finding there a quantity of liquor, the sheriff took said plaintiffs in error in custody, bringing them to the City of Fort Benton and lodged them in the County Jail; all of which was done without warrant of arrest, search warrant, or other process; and the sheriff seized and held the automobile and its contents; on the 10th day of November, 1921 an information was filed in the District

Court of the Twelfth Judicial District of the State of Montana, in and for the County of Chouteau, charging and accusing these plaintiffs in error, defendants there, with the crime of "illegally possessing and transporting intoxicating liquors"; whereupon defendants immediately filed a petition asking for a return of the property so taken, and a suppression of the same as evidence, for the reason that it had been wrongfully seized in violation of their constitutional rights; in violation of Article IV of Amendments of the United States Constitution and Section VII of Article III of the Constitution of the State of Montana; that thereafter and on December 12th, 1921, said information was by the State Court dismissed and the sheriff ordered to "Return and redeliver" the property thus wrongfully taken, to plaintiffs in error; pp. 16 and 17 printed record.

That on the same day at the same time, one L. S. Groff, who was a deputy United States Prohibtion Law Enforcement Officer, under appointment from one O. H. P. Shelly, United States Prohibition Law Enforcement Officer for the State of Montana, without warrant of arrest, search warrant or other process, arrested the defendants, plaintiffs in error here, and again lodged them in the County jail at Fort Benton, Montana, seized their car and its contents and held the same in violation of their constitutional rights; all of which was done without complying with the order of the District Court above referred to;

That said defendants, plaintiffs in error here,

were so confined at the County jail at Fort Benton, Montana and their property wrongfully held until December 15th, 1921, when an information was filed in the United States District Court at Great Falls, Montana, by one Ronald Higgins, a deputy United States Attorney, for the District of Montana, (who laid the information in his own name as assistant United States Attorney for the District of Montana. (pp. 2, , and 4 of printed record) charging and accusing these plaintiffs in error with three separate counts:

First: "Illegally transporting intoxicating liquors without a permit."

Second: "Illegally transporting intoxicating liquors without making a permanent record thereof."

Third: "Wrongfully possessing intoxicating liquors for use in violation of the National Prohibition Act."

Which said information was based upon an affidavit of U. W. Hammaker, sheriff of Chouteau County, Montana; (pp. 5 and 6 of printed record.) Wherein he alleges, on the 12th day of December, 1921 that he is still in possession of the liquor thus wrongfully taken, even as against the order of the District Court of the State of Montana.

That on the 17th day of December, 1921, plaintiffs in error were arrested upon a bench warrant issued out of the United States District Court for the District of Montana and said property taken in charge by the United States Marshall without

a search warrant; that on the said 17th day of December, 1921, plaintiffs in error filed with the United States District Court for the District of Montana, Great Falls Division, their duly verified petition in writing, asking for the return and redelivery of said property for the reason that it had been wrongfully seized in violation of their constitutional rights; (pp. 12, 13, 14, 15, 16 and 17 of printed record).

That thereafter and on December 20th, 1921, said cause came on for hearing before said United States District Court for the District of Montana, Great Falls Division, and after a jury had been duly impanelled and sworn to try the case, the Court proceeded to hear said petition and the proof offered thereon; that said petition was denied and upon trial of the issue a verdict of "Guilty" was returned (p. 8 printed record) and judgment thereupon entered, finding said plaintiffs in error the sum of Three Hundred ($300) Dollars and cost, (pp. 9 and 10 of printed record).

EVIDENCE

I. EVIDENCE OF WRONGFUL ARREST ON THE PART OF THE SHERIFF OF CHOUTEAU COUNTY, MONTANA.

On trial of the issue the evidence showed that the arrest as made by the sheriff of Chouteau County, Montana was illegal, having been made without warrant or arrest or warrant to search, and upon dismissal of the case on December 12th, 1921 the District Court of the Twelfth Judicial

District for the State of Montana, wherein said action was pending, ordered a "Return and re-delivery" of the property so taken. (Bottom of page 16, top of page 17, printed record).

II. EVIDENCE OF WRONGFUL ARREST AND SEIZURE ON THE PART OF THE FEDERAL OFFICER.

The evidence showed that the arrest and seizure on the part of L. S. Groff, deputy United States prohibition law enforcement officer, was made without warrant of arrest, or search, without any authority whatsoever, and in violation of the order of the State Court, and in violation of the constitutional rights of the plaintiffs in error, (petition of plaintiffs in error, page 14; testimony of U. W. Hammaker, page 21 printed record).

III. EVIDENCE OF COLLUSION BETWEEN FEDERAL, STATE AND OFFICERS.

The allegation of the petition of plaintiffs in error (on page 14 of written transcript) is substantiated and the evidence of U. W. Hammaker (on page 20) tends to prove the allegation of collusion between the sheriff and Federal prohibition officers (pp. 20, 21, 22, printed record). The evidence showed a concerted action between the sheriff and Federal prohibition officers throughout the period of prosecution in the State Court as well as in the Federal Court, at the conclusion of Mr. Hammaker's testimony, showing that a Federal Officer was present at each hearing and the admission on his part that he had com-

municated with them. (Top of page 21, printed record).

SPECIFICATIONS OF ERROR

I.

That the said Court erred in refusing to grant said petition for return of personal property and suppression of the same as evidence. (pp. 2, 3, 4 and 5 of said Bill of Exceptions), Article IV, Amendments to the Constitution of the United States).

II.

That the said Court erred in ruling that: "It makes no difference how evidence may have been obtained by a sheriff even though by wrongful seizure, it is still admissible as evidence in the Federal Court as against the defendants". and upon further ruling that "Where liquor is placed in a car and started to move, without a permit(the liquor and vehicle, or evidence) becomes forfeited to the Government."

III.

That the Court erred in allowing U. W. Hammaker, Sheriff and George Campbell, Deputy Sheriff, who made the wrongful seizure, to testify relative to the contents of said car or to give evidence in said case where the information was wrongfully obtained.

IV.

The Court erred in refusing to strike out the evidence of said U. W. Hammaker for the reason that it was wrongfully obtained, he not having a search warrant or any warrant for the arrest of

said defendants, and evidence being as follows: (pp. 30, 31, 32 and 33, printed record).

V.

That said Court erred in refusing to grant defendants motion for a dismissal of said action upon the Government resting its case. Defendant's motion: "We move the Court to dismiss said action for the reason that there is not sufficient evidence before the jury to sustain a verdict of "Guilty", the liquor not having been introduced in evidence, and for the reason that the evidence, and all of it, has been unlawfully and illegally secured in contravention of the constitutional rights of these defendants", whereupon the Court permitted the Government to reopen said case and introduce the liquor in evidence.

VI.

That the Court erred in permitting the introduction of said liquor in evidence over defendant's objection "That the evidence had been unlawfully secured by reason of the unwarranted search and seizure, the same having been made without search warrant or any warrant in contravention to the constitutional rights of these defendants."

VII.

That the Court erred in permitting said jury to return a verdict of "Guilty" upon the evidence thus introduced.

VIII.

That said Court erred in entering said verdict on judgment thereon.

FINAL ISSUES

The above errors may be grouped for the purpose of simplifying the argument, into four fundamental questions which therefore become the main issues in the case.

THUS: ERRORS I, III, IV and VI become ISSUE I.

Was the immunity from unreasonable searches and seizures afforded by U. S. Constitution, 4th Amendment, violated where the Court refuses the accused's reasonable application for the return of his property seized by a Federal Officer without process? Is the admission of the same as evidence reversible error?

ERROR II becomes ISSUE II.

Is evidence secured in any manner by a sheriff, admissible in a Federal Court?

ERRORS V and VII rest upon ISSUE III.

Is it proper for the trial Court to permit the prosecution to reopen the case after the defendants have rested to introduce testimony to make a case, and allow the same to go to the jury?

ERROR VIII becomes ISSUE IV.

Are the pleadings sufficient to sustain a verdict and judgment, where the information is layed by an assistant District Attorney in his own name?

POINTS AND AUTHORITIES

ISSUE I.

THE HONORABLE UNITED STATES DISTRICT COURT FOR THE STATE OF MONTANA ERRED IN DETERMINING THAT THERE HAD

BEEN NO VIOLATION OF THE CONSTITUTIONAL RIGHTS OF THE PLAINTIFFS IN ERROR WHERE THE SEIZURE WAS MADE BY A FEDERAL OFFICER WITHOUT PROCESS (p. 21 printed record.)

Point I.

It adjudicated the case upon the theory, that only one seizure had been made and that by the sheriff of the State Court; whereas plaintiffs in error had recovered from this seizure and the same had been reseized by a Federal Officer without warrant. (p. 21 printed record).

Fitter vs. United States, 285 Federal 567;
In Re. Tri-State Coal and Coke Company, 253 Fed. 605;
Weeks vs. United States, 232 United States 652;
34 Supreme Court Reporter, 341;
LRA 1915 B 834;
State vs. Peterson (Wyo.), 194 Pac. 342;
State ex rel Samlin vs. District Court (Mont.), 198 Pac. 362.

Point 2.

It adjudicated the matter upon the theory that the seizure by the Federal Officer without warrant or authority was not a violation of the constitutional rights of the plaintiffs in error, the same having been seized from the sheriff, who was holding the property subject to the orders of the State Court and therefore could not consent to a seizure.

United States Constitution IV Amendment;
Bram vs. United States, 168 United States 585;
Laughter vs. United States, 259 Fed. 94;
Veider vs. United States, 252 Fed. 414;
United States vs. Premises in Butte, Montana, 246 Federal, 185;
Fitter vs. United States, 285 Fed. 267.

Point 3.

The seizure by L. S. Groff was unlawful and not based upon the information in this case; having been made on December 12th, 1921 (p. 21 of printed record) while the information was not filed until December 15th, 1921 (p. 4 printed record).

United States vs. McHie, 194 Fed. 894, where the Court erred: Where an arrest of one alleged to have been operating a bucket shop was made without warrant because of the absence of a marshall or deputy marshall: seizure of personal property made at the same time was therefore illegal.

United States vs. Mounday, 208 Fed. 186.

"Where a marshall in going to arrest defendants for misuse of mails, was accompanied by certain inspectors who, without a warrant, remained after the arrest and took possession of the defendant's books, papers and documents, found in their office and carried them away, the inspectors were guilty of unreasonable search and seizure in violation of the Constitutional Amendment—Article IV."

Point 4.

The admission in evidence of property wrongfully seized is reversible error.

Weeks vs. United States, Supra;
Boyd vs. United States, 116 U. S. 616.

ISSUE II.

THE HONORABLE UNITED STATES DISTRICT COURT FOR THE STATE OF MONTANA, ERRED IN HOLDING THAT "IT IS IMMATERIAL IN WHAT MANNER A SHERIFF MAY HAVE SECURED POSSESSION OF THE EVIDENCE, THE SAME IS ADMISSIBLE IN THE FEDERAL COURT."

Point I.

For in the case at bar the property though wrongfully seized by a Federal Officer and held in volation of the constittional rights of the plaintiffs in error (p. 21 of printed record) was the property introduced and to which the sheriff testified.

United States vs. McHie, Supra;
United States vs. Mounday, Supra;
Weeks vs. United States, Supra.

ISSUE III.

THE HONORABLE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, ERRED IN PERMITTING THE PROSECUTION TO REOPEN ITS CASE AFTER THE DEFENDANTS HAD RESTED AND TO INTRODUCE THE LIQUOR IN EVIDENCE, AND AL-

LOWING THE SHERIFF TO TESTIFY AS TO THE CONTENTS OF THE BOTTLE.

Point I.

(A) For the reason that the sheriff did not know what the bottle contained (p. 19 printed record).

(B) For the reason that there was no evidence that the bottle as introduced in evidence contained liquor.

ISSUE IV.

THE HONORABLE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, ERRED IN ENTERING THE VERDICT OF THE JURY AS RETURNED AND JUDGMENT THEREON.

Point I.

(A) For the reason that the information as laid is made in the name of Ronald Higgins, Assistant United States District Attorney, in his own name, he not being a prosecuting officer recognized by law.

POWERS, DUTIES AND LIABILITIES OF THE UNITED STATES DISTRICT ATTORNEYS.

Section 771 Federal Statutes, Annotated.

"It shall be the duty of every District Attorney to prosecute, in his district, all delinquents for crimes, and offences, cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the

Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors or other officers of the revenue, for any act done by them, or for the recovery of any money exacted by, or paid to such officers, and by them paid into the treasury."

Levy Ct. vs. Ringgold;

5 Peters 451, 8 United States L. Ed. 188.

Holding: "The District Attorney derives his authority from acts of Congress and not from the laws of any State, and his rights and duties are to be collected from those acts."

San Francisco vs. United States, 4 Sawy 53,

21 Fed. Case No. 12,316 at page 371.

"The District Attorney is the regular officer of the government, having charge of all its legal proceedings within his district, subject only to the direction and supervision of the Attorney-General. When other Counsel are employed for these proceedings it is to aid him in their management, not to assume his authority or direct his conduct."

8 Opins, Attorney-General 399.

"It is the official duty of the District Attorney to appear in all cases in which the United States shall be concerned, whether the case stands in the name of the United States or some officer of the United States."

United States vs. Morgan, 222 United States

274; 33 Supreme Court 81, 56 L. Ed. 198;

United States vs. Stone, 8 Fed. 261.

"Under our Federal Statute from the earliest times and by force of the Statute, the District At-

torney is the only prosecutor known to our law—no private prosecutor has ever been recognized."

United States vs. McAvoy, 26 Fed. Case No. 15,654 4 Blatchf, 418.

(B) The information is fatally defective, it not having been filed by the District Attorney or by someone in his name.

"Under this Statute it has always been held by the Federal States in this District that there is no power conferred on them, by statute or usage, to recognize a suit, civil or criminal, as legally before them in the name of the United States, unless it is instituted and prosecuted by the District Attorney legally appointed and commissioned conformbaly to the Statute."
formably to the Statute."

United States vs. Doughty, 7 Blatchf, 424; 25

The Court saying: "This Court can recognize the United States as a plaintiff on the record only when the record shows that the United States appears as plaintiff by the District Attorney of this district. It is a good ground of demurrer that an action in behalf of the United States is prosecuted in the name of an attorney, not the District Attorney, to whom is exclusively confined the conduct of the actions in which the Government is interested."

United States vs. Morris, 1 Payne, 209;
26 Federal cas. No. 15,816, Affirm 10 Wheaton 246; 6 U. S. (L. Ed.) 314.

ARGUMENT

ISSUE I.

THE HONORABLE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, ERRED IN DETERMINING THAT THERE HAD BEEN NO VIOLATION OF THE CONSTITUTIONAL RIGHTS OF THE PLAINTIFFS IN ERROR, WHERE THE SEIZURE WAS MADE BY A FEDERAL OFFICER WITHOUT PROCESS. (p. 21 printed record).

Point I.

It adjudicated the case upon the theory that only one seizure had been made and that by the sheriff of the State Court; whereas plaintiffs in error had recovered from this seizure and the same had been reseized by a federal officer without warrant. (p. 21 printed record).

(1) It held that the property in the possession of the sheriff as agent of the federal officer, Groff, was in the possession of the original seizure, and

(2) It admitted the testimony of the sheriff with reference to the seizure and possession of the liquor without inquiring as to the authority by which he was holding the same. The record shows (pp. 16 and 17) that the sheriff had lost possession of the property by reason of the seizure made by himself and was holding the same for one L. S. Groff, who had made a seizure without process (p. 21 printed record). Groff was a federal officer without authority.

This brings the case within the purview of the decision in

Weeks vs. United States, 232 U. S. 652, 34 Sup. Ct. R., 32, LRA 1915, B 834;
Boyd vs. United States, 116 U. S. 616;
United States vs. Abrams, 230 Fed. 313;
Bram vs. United States 168, U. S. 532, at p. 542; 42 (L. Ed.) 568.

Point 2

It adjudicated the matter upon the theory that the seizure by the federal officer without warrant or authority was not a violation of the constitutional rights of the plaintiffs in error, the same having been seized from the sheriff, who was holding the property subject to the orders of the State Court and therefore could not consent to a seizure.

(1) It held that "It makes no difference in what manner a sheriff may come into possession of evidence, the same is admissible in the Federal Court, and that where liquor is placed in a car and started to move it becomes forfeited to the government under the Revenue Law.

(A) For the reason that the tax had not been paid upon the same.

(B) For the reason that it is unlawful to have the same in possession without a permit.

This cannot enter into the determination of this matter.

(1) For the reason that the violation of the constitutional rights of the plaintiffs in error was raised by a petition before trial of the issue.

(2) For the reason that the seizure of the Federal Officer, L. S. Groff, took it out of the catagory of cases relied upon as an authority in the decision of the Court; in that without permitting the sheriff to comply with the order of the State Court, the federal officer had seized the same in violation of the Court's order without right or authority for so doing. To permit such a practice would be to outwit the law and defeat a party's rights by a violation of the constitution of greater magnitude than the one for which the prosecution was had.

Laughter vs. United States, 259 Fed. 94;
Veider vs. United States, 252 Fed. 414.

Where the Court said: "One's person and property must be entitled in an orderly democracy, to protection against mob hysteria and the oppression of the agents whom the people have chosen to represent them in the adminstration of the laws which are required to operate on all alike. One's home and place of business are not to be invaded forcibly and searched by the curious and suspicious; not even by a disinterested officer of the law, unless he be armed with a search warrant.

We can not concede that where property has been seized by a sheriff in violation of the constitutional rights of a party, it is still admissible in evidence.

For the reason that this would make it possible to defeat the constitutional rights of any defendant, and that was not the intention of the framers of the constitution when Amendment IV was

drawn. The sheriff of a State is an officer under the constitution and amenable to its provision for the reason; that had the case in the State Court been prosecuted to a determination and the petition of the plaintiffs in error denied, and had the decision of the District Court in that instance been affirmed by the Supreme Court of the State of Montana, an appeal to the United States Supreme Court would have raised the question as thoroughly and the United States Supreme Court would have passed upon the constitutionality of the question the same as if it had been raised in the Federal Court.

"A final judgment or decree in any suit in the highest court of a State in which a decision in a suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, or immunity is claimed under the constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity, especially set up or claimed, by either party under such constitution treaty, statute, commission, or authority, may be re-examned and reversed or affirmed in the Supreme Court upon a

writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may at their discretion award execution or remand the same to the Court from which it was removed by the writ.

(A) It is so held by the following cases:
Pac. R. R. Case 115 U. S. 1, 20 (L. Ed.) 319;
Union Pacific R. Co. vs. Harris, 158 U. S. 326, 39 (L. Ed.) 1003.

It is well established that where a suit is brought in a State Court and a Federal question is presented the defendant may permit the case to go to judgment and take his appeal to the Supreme Court of his State and, if the decision of the court is against the Federal right for which he contends, he may then sue out a writ of error to the Supreme Court of the United States and present the question before that tribunal. The case comes before that Court presenting exactly the same question as would be presented if the defendant had taken the other course—had petitioned for the removal of the Federal Court, and had carried the case to the Supreme Court of the United States by way of appeal or writ of error from the Federal Court.

Therefore, where the sheriff had made a seizure in violation of the rights of the plaintiffs in error and they having raised the question by petition in the State Court and that Court having ordered a return of the property the Federal Court can

not be heard to say that they will not be bound by the constitution by reason of the fact that the sheriff is not an officer of that Court.

Point 3.

The seizure by L. S. Groff was unlawful and not based upon the information in this case; having been made on December 12th, 1921, (p. 21 printed record) while the information was not filed until December 15th, 1921. (p. 4 printed record).

Granting that the Court's ruling was correct, which we do not admit, the seizure by L. S. Groff took the case out of the category of cases upon which the Court relied as authority for its decision.

For the reason that the seizure was made by a Federal officer without authority, and the petition of the plaintiffs in error, which was made timely, raised the question of the admissibility of the same in evidence, and

While the prosecution apparently attempted to avoid the consequences by calling the sheriff to testify, the introduction of the liquor in evidence is reversable error.

United States vs. Friedberg, 233 Fed., 313;
Fitter vs. United States, 258 Fed. 567;
Veider vs. United States, 252 Fed. 414;
United States vs. Abrams, 230 Fed. 313;
Adams vs. New York, 192 U. S. 585;
Boyd vs. United States. 116 U. S. 616;
Weeks vs. United States, 232 U. S. 652 Sup. Ct. R. 34 Sup. Ct. R. 341 LRA 1915 B 834.

ISSUE II.

THE HONORABLE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA ERRED IN HOLDING THAT IT IS IMMATERIAL IN WHAT MANNER A SHERIFF MAY HAVE SECURED POSSESSION OF THE EVIDENCE, THE SAME IS ADMISSIBLE IN THE FEDERAL COURT.

Point 1.

For in the case at bar the property though wrongfully seized by a federal officer and held in violation of the constitutional rights of the plaintiffs in error (p. 21 printed record) was the property introduced in evidence and to which the sheriff testified.

While the plaintiffs in error here would have been justified in seizing by force the property from the sheriff after December 12th, 1921 and in resisting the seizure by L. S. Groff, the federal ofcer who made the seizure as testified to by the sheriff (p. 21 printed record) they have followed the lawful course in protecting their interests and their constitutional rights by petition addressed to the Court asking for a return of the property seized.

Laughter vs. United States, Supra;
United States vs. McHie, Supra.

ISSUE III.

THE HONORABLE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, ERRED IN PERMITTING THE PROSE-

CUTION TO REOPEN ITS CASE AFTER THE DEFENDANT HAD RESED AND TO INTRODUCE THE LIQUOR IN EVIDENCE, AND ALLOWING THE SHERIFF TO TESTIFY AS TO THE CONTENTS OF THE BOTTLE.

Point 1.

(A) For the reason that the sheriff did not know what the bottle contained (p. 19, printed record).

(B) For the reason that there was no evidence that the bottle contained liquor.

There is no authority in law for the reopening of a case after the same has been closed, to allow the introduction of evidence to make a case, and

It is only through the discretion of the Court that the case may be reopened, and the introduction of the property wrongfully seized is not a matter discretionary with the Court, and

To allow the prosecution to reopen in order to make a case is an abuse of discretion.

ISSUE IV.

THE HONORABLE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, ERRED IN ENTERING THE VERDICT OF THE JURY AS RETURNED AND JUDGMENT THEREON.

Point 1.

(A) For the reason that the information as laid is in the name of Ronald Higgins, assistant United States District Attorney, in his own name,

he not being prosecuting officer recognized by law.

Section 771 Federal Statutes, Ann. provides that all prosecutions for delinquents in crimes and offences cognizable under the authority of the United States must be brought by the District Attorney, and

There is no authority in law by which the assistant United States District Attorney may bring an action in his name, but only in the name of his principal who is commissioned by law for that purpose.

Levy Ct. vs. Ringgold, 5 Peters, 451, 8 U. S. (L. Ed.) 188;

Holding: "The District Attorney derives his authority from the acts of Congress and not from the laws of any State and his rights and duties are to be collected from those acts."

San Francisco vs. United States, 4 Sawy. 53, 21 Fed. Cas. No. 12,316, at page 371.

A deputy or assistant in any office acts wholly upon the authority of his principal in his, the principal's name and any action taken upon his own authority is invalid in law. "The district attorney is the regular officer of the government, having charge of all its legal proceedings within his district, subject only to the direction and supervision of the Attorney-General. When other counsel are employed in these proceedings it is to aid him in their management, not to assume his authority or direct his conduct."

8 Opins., Attorney-General, 399.

Assistant United States District Attorneys are not appointed independently of the creation of the District Attorney's office but are only additional help provided to take care of the work of such office and to assist the District Attorney in the care of surplus business and their number is governed by the amount of litigation handled in the particular district.

It is the official duty of the District Attorney to appear in all cases in which the United States shall be concerned, whether the case stands in the name of the United States or some officer of the United States.

In the case—The United States vs. McAvoy, 26 Fed. Case No. 15,654, 4 Blatchf, 418, the Court said "Under our Federal Statutes from the earliest times and by force of the Statute the District Attorney is the only prosecutor known to our law—no private prosecutor has ever been recognized." Then, where a prosecution is brought by an assistant United States District Attorney in his own name, he not being recognized as a prosecuting officer other than as representing the District Attorney, the information is insufficient in form to give the District Court jurisdiction or to sustain a verdict and judgment thereon.

(B) The information is fatally defective in not having been filed by the District Attorney, or someone in his name.

In the case of—United States vs. Doughty, 7 Blatchf, 424, 25 Fed. Case No. 14,986, where the Court in dismissing a bill in equity which did not

state, in the body of it, that the United States brought it by the District Attorney but merely that they brought it against the defendant at the relation of the relators; the Court said "This Court can recognize the United States as a plaintiff on the record only when the record shows that the United States appears as plaintiff by the District Attorney of this district."

United States vs. Morris, 1 Payne, 209, 26 Fed. Cas. No. 15,816, Affirmed 10 Wheaton 246, 6 U. S. (L. Ed.) 314.

CONCLUSION

We submit that the judgment of the Honorable United States District Court brought here for review is a most unrighteous one; it is not based upon the law, and it is a denial of the constitutional rights of plaintiffs in error.

The evidence upon trial of the issue proves conclusively the allegations of the plaintiffs' petition for return of the property, (pp. 12 to 16 incl. printed record) that the seizure by the sheriff had been annuled by the order of the State District Court and he being unable longer to hold the property, a seizure was made by L. S. Groff, United States Deputy Prohibition Law Enforcement Officer, in order that the property might be held and introduced in the Federal Court. The Court itself did not recognize the seizure made by L. S. Groff for the reason that it was made without authority; upon the evidence of U. W. Hammaker, (p. 21 printed record), the Court should have immediate-

ly directed a verdict for the defendants and ordered the property returned. The case is identical to the case of Weeks vs. United States, cited above, in that the seizure by both the sheriff and federal officer was wrongful and the property thus introduced in evidence was an improper exhibit. The mere fact that a sheriff was called to testify instead of the federal officer can not be held to take the case out of the purview of the former decisions upon questions of like nature. We submit that had the sheriff held the property under his original seizure and introduced the same in evidence there could then be found some authorities holding that it was admissible, although we do not believe that the best authorities can follow that line of decisions; for clearly had the issue been brought up in the State Court. The fact that the violation of the United States Constitution had been perpetrated by the sheriff and not a federal officer, would not change the decision of the Supreme Court and the same would be held a violation of the constitutional rights of the plaintiffs in error.

The wording of Article IV of the Amendments to the Constitution is unequivocal and the declaration includes all who act under the authority of any law, whether State or Federal. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly de-

scribing the place to be searched, and the person or things to be seized."

Clearly, there is no language here which can be interpreted to mean that this applies only to federal officers, the declaration guarantees the security of the citizen from any, and all, unlawful searches and seizures, whether perpetrated by a federal officer, State offcer or municipal officer, it is nevertheless, an unlawful search and seizure which the Court, sworn to defend the constitution, can not pass unchallenged.

If this decision should be set down as a precedent to be followed in the future, it can not but tend to force the citizen to protect his rights by force instead of abiding the decision of the Courts, and the highest duty that a Court is called upon to perform, is that, in upholding the letter of the constitution. The cause from which resulted the very heart of the section of the constitution here called in question, came about through the officers of the peace continually reaching out under their authority and abusing that authority, until the people in their might, rose up and wrung from King John, the great Magna Charta, on the field of Runny Mead;

Therefore, the Courts must most jealously guard these provisions of the constitution, and to protect the rights of the citizen from the ever-extended efforts of the man clothed with the authority to enforce the law.

Surely, it was not the intention of the Courts in their prior decision on this line, to grant that

the Federal and State officers, by conspiring together, might outwit the law, and the constitution to strip the citizen of his rights before the Court. If this be the final decision in such a case, there is nothing to prevent an over-zealous sheriff from thoroughly defeating the most sacred right of a citizen by an unwarranted search and seizure of his property under color of his authority in the office he holds and turning them over to federal officers for prosecution. It is, to say the least, a process of brigandage which the Courts of Justice should not for an instant countenance.

We submit, therefore, that the judgment of the Honorable United States District Court for the District of Montana, should be reversed, and the case dismissed, and the property of plaintiffs in error returned as in their petition prayed for, for the reason that the constitutional rights of these plaintiffs in error have been most grossly violated and the pleadings in the case are not sufficient in form to sustain the verdict and judgment entered thereon.

J. A. KAVANEY,

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